No. 14-17-00098-CR

In the
Court of Appeals
For the
Fourteenth District of Texas
At Houston

No. 2109329
In the Criminal County Court at Law No. 6
Of Harris County, Texas

MARC WAKEFIELD DUNHAM
Appellant
V.
THE STATE OF TEXAS
Appellee

STATE'S APPELLATE BRIEF

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ORAL ARGUMENT WAIVED

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 9.4(g) and TEX. R. APP. P. 39.1, the State waives oral argument. But the State will present argument if this Court deems it necessary.

IDENTIFICATION OF THE PARTIES

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Valerie Turner; Adam Broderick—Assistant District Attorneys at trial

Appellant or Criminal Defendant:

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Trial Judge:

Honorable Larry Standley—Presiding Judge for CCCL # 6

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TO THE HONORABLE COURT OF APPEALS:

STATEMENT OF THE CASE

The State charged the appellant with the misdemeanor offense of Deceptive Business Practices and the jury found the appellant guilty (CR—8, 89). The trial court sentenced the appellant to 1 year in the Harris County Jail (CR—91-2). The appellant gave timely notice of appeal, and the trial court certified that he had the right to appeal (CR—94-96).

STATEMENT OF FACTS

On June 15, 2016, the appellant rang Eloise Moody's doorbell and stated, "I'm here to update your security," gesturing to her alarm company's yard sign by her front door (3 RR 22-25). At that time Moody—who was 81 years old, had recently lost her husband, and was on a fixed income—had a contract with Central Security Group ("Central") (3 RR 25-29). Believing, based on his statements and his gesture, the appellant worked for Central, she invited him in her home (3 RR 26-7).

Inside Moody's home, the appellant proceeded to detail the improvements that he could make to her security system, including a light for her yard sign, a life alert button, a remote control to turn the system on or off, and new panel (3 RR 24-34). He explained that these features, the new equipment, and the installation

would be free (3 RR 29, 31, 61-2). The appellant informed her that the technician could install it right away (3 RR 24-31). Eventually the appellant showed Moody the contract that stated she would actually be required to pay monthly monitoring; this was the first time Moody realized the appellant worked for Capital Connect ("Capital"), a different alarm company (3 RR 30-36). The contract specified that she would be paying more than double what she currently paid Central to get the upgrades the appellant showed her (3 RR 29-37, 62). *See* (St. Ex. 1, 2, 5).

Before Moody signed the contract, the technician began cutting out her Central alarm system and replacing it with Capital's system (3 RR 37-38). *See* (St. Ex. 3). Moody, confused and not understanding why he was cutting out her alarm system, agreed to the contract and signed it (3 RR 34-47). Moody stated that she would not have let the appellant in her home had she known he worked for a different alarm company (3 RR 34).

Several days later, Moody's daughter helped her to cancel the contract with Capital; Capital's features did not work for Moody because she did have internet, something she had told the appellant at the time of his house call (3 RR 34-36, 51-57). Because her old system was cut and cancelled, Moody's daughter helped her set up a new contract with a separate alarm company, which costs her more than her original contract with Central (3 RR 58, 91, 97-8).

Brisa Rodriguez, a deputy with the Precinct 5 Harris County Constable's Office (HCCO), responded to Moody's call for service and learned about how Moody felt she had been deceived by the appellant (3 RR 156-76). Through her investigation, Rodriguez learned the appellant used similar tactics to sell the Capital system to other people around the same time and who lived in the same neighborhood (3 RR 164; 4 RR 11-58, 64-88).

SUMMARY OF THE ARGUMENT

The evidence admitted in this case was legally sufficient to enable a rational factfinder to find each element of the offense of deceptive business practices, including evidence that the appellant perpetrated the offense, giving due deference to the jury's role as the factfinder and judge of the credibility of the evidence, and reviewing the record in the light most favorable to the guilty verdict.

Additionally, there was no jury charge error. The statutory language of Section 32.42 of the Texas Penal Code does not require a jury to be unanimous regarding which alternative modes or means by which the offense may be committed. Thus, the trial court did not err in denying the appellant's request for such language in the charge.

REPLY TO APPELLANT'S FIRST POINT OF ERROR

In the appellant's first point of error, he complains that the evidence is legally insufficient to sustain his conviction for deceptive business practices. Specifically, the appellant contends that there was no evidence the appellant represented he was with "Central" and there was no evidence presented that he made misleading statements regarding the price of the new alarm system. (App'nt Brf. 9-21). This argument lacks merit because any rational jury could have found the appellant guilty based on the testimonial and circumstantial evidence presented.

I. Standard of Review and Applicable Law

Every criminal conviction must be supported by legally sufficient evidence that each element of the offense is proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979); *Adames v. State*, 353 S.W.3d 854, 853 (Tex. Crim. App. 2011). In order to determine whether this standard has been met, an appellate court reviews all the evidence in the light most favorable to the verdict and decides whether, based on that evidence and reasonable inferences, a rational factfinder could have found each essential element of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 319 (finding that "the relevant question is whether, after viewing the evidence in light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable

doubt.") (emphasis in original); *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013); *Reed v. State*, 158 S.W.3d 44, 46 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). This applies equally to the analysis of direct or circumstantial evidence in the record. *Reed*, 158 S.W.3d at 47.

Circumstantial evidence alone can be sufficient to establish guilt, and is analyzed the same as direct evidence in the record. *Temple*, 390 S.W.3d at 359 ("A criminal conviction may be based upon circumstantial evidence."); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (noting "[c]ircumstantial evidence is as probative as direct evidence in establishing the guilt of an actor" and that "circumstantial evidence alone can be sufficient to establish guilt."); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007) (same). Not every fact has to point to the defendant's guilt, rather "it is enough if the conclusion is warranted by the combined and cumulative force of all the incriminating circumstances." *Temple*, 390 S.W.3d at 359 (quoting *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993)); *see Clayton*, 235 S.W.3d at 778. When conflicts appear in the record a reviewing court must presume the trier of fact resolved the conflict in favor of the verdict and should defer to that resolution. *Id.* at 778-79.

The jury's role is to "weigh the evidence, to judge the credibility of the witnesses, and to choose between the conflicting theories of the case." *Lopez v.*

State, 884 S.W.2d 918, 921 (Tex. App.—Austin 1994, pet. ref'd) (citing *Geesa v. State*, 820 S.W.2d 154, 159 (Tex. Crim. App. 1991) (overruled in part on other grounds by *Paulson v. State*, 28 S.W.3d 570 (Tex. Crim. App. 2000))). This Court's role is not to simply compare an appellant's analysis of the evidence against the State's analysis of the same evidence. *Cardenas v. State*, 30 S.W.3d 384, 389 (Tex. Crim. App. 2000). Rather, this Court must uphold the verdict unless a factfinder does not act rationally. *Laster v. State*, 275 S.W.3d 512, 517-518 (Tex. Crim. App. 2009) (stating this Court's role is to guard against this "rare occurrence" where a jury acts irrationally).

II. A rational jury could have found beyond a reasonable doubt that the appellant committed deceptive business practices.

The jury concluded beyond a reasonable doubt that on or about June 15, 2016, the appellant committed deceptive business practices by intentionally, knowingly or recklessly either:

1. representing that a commodity or service is of a particular style, grade, or model if it was another, namely: by giving the impression to the complainant that an alarm system was a Central alarm system when it was Capital; or

2. representing the price of property or service falsely or in a way tending to mislead, namely by telling the complainant that a new alarm system installation would be free when such installation actually required new contract at additional cost; or

3. making a materially false or misleading statement in connection with the purchase or sale of property or service,

> namely by telling the complainant that a new alarm system installation would be free when such installation required a new contract at additional cost.

(CR—8, 87, 89). TEX. PENAL CODE § 32.42(b)(7) (West); TEX. PENAL CODE § 32.42(b)(9) (West); TEX. PENAL CODE § 32.42(b)(12) (West). When, as here, a jury returns a general verdict and the evidence is sufficient to support a guilty finding under any of the allegations submitted, the verdict should be upheld. *See Fuller v. State*, 827 S.W.2d 919, 931 (Tex. Crim. App. 1992); *see also O'Brien v. State*, 482 S.W.3d 593, 605–06 (Tex. App.—Houston [1st Dist.] 2015, pet. granted).

The appellant argues that because the complainant signed a contract, stating the terms of the deal, the evidence is insufficient to prove that he committed the offense of deceptive business practices. (App'nt Brf. 12-21). But the appellant ignores the actions he took prior to the contract being signed. The appellant appears to contend that a signature on a contract rectifies any earlier deceptive business practices that may have induced a consumer to sign such contract; however, he cites no authority for this position. Rather, based on the plain language and intent of the statute, deceptive business practice includes actions before, during, and after a sale. *See* TEX. PENAL CODE § 32.42(b) (West).

Section 32.42(b) of the Texas Penal Code lists 12 separate manners and means of committing the offense of deceptive business practices. TEX. PENAL CODE § 32.42(b) (West). While the State agrees that caselaw analyzing this statute is

limited, it is a reasonable interpretation that the statute's intent is to criminalize conduct (i.e. alternative deceptive business practices) both leading up to the completion of a transaction and at the time when such transactions are complete.[1] *See Torres v. State*, 04-12-00752-CR, 2013 WL 5942605, at *2 (Tex. App.—San Antonio Nov. 6, 2013, pet. ref'd) (not designated for publication) (noting the different statutory language contained in the subsections of 32.42(b); "Unlike section 32.42(b)(12)(B), section 32.42(b)(2) does not focus on a statement made in advance of the sale."). Nowhere in the plain language of the statute does an offense require a purchase or completed transaction to make the conduct criminal. *See id*.

Moreover, the statute defines the term "sale" to incude an "offer for sale, advertise for sale, expose for sale, keep for the purpose of sale, deliver for or after sale, solicit and offer to buy, and every disposition for value." TEX. PENAL CODE § 32.42(a)(9) (West).Thus, the definition encompasses all aspects of a sale, from the advertising to the delivery stage. *See Torres*, 2013 WL 5942605 at *2 ("the delivery stage of the sale in addition to the offer stage of the sale."). The statute aims at preventing a "bait and switch" or a "Trojan horse" type business practice that

[1] Notably, the plain language of several manner and means punish conduct after a transaction is complete ("selling less than represented quantity") and others punish conduct leading up to a transaction ("representing that a commodity...is of another"). *See* TEX. PENAL CODE § 32.42(b) (West).

induces consumers into entering one-sided contracts or into purchasing a lesser quality product. *See id.*

Furthermore, looking specifically at the subsections under which the appellant was charged, each refers to "representing" or "misleading" practices that would usually occur prior to the completion of the sale; thus, criminalizing conduct occuring prior to the transaction being finalized. TEX. PENAL CODE § 32.42(b)(7) (West); TEX. PENAL CODE § 32.42(b)(9) (West); TEX. PENAL CODE § 32.42(b)(12) (West). Thus, contrary to the appellant's contentions, a deceptive business practice can be committed in all aspects of the transaction and is not excused merely by a signature on a contract stating appropriate terms. *See id*; *see also* TEX. BUS. & COMM. CODE ANN. § 17.47 (West)[2] (allowing the attorney general bring an action in the public interest against an entity it believes is engaged in conduct prohibited by the DTPA without requiring a victim); *Daugherty v. Jacobs*, 187 S.W.3d 607, 614 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (noting under DTPA that "[o]ral representations, whether made before or after the execution of an agreement, are not only admissible but may serve as the basis of a DTPA action.").

[2] "The DTPA was enacted to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide consumers with a means to redress deceptive practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit." *Miller v. Keyser*, 90 S.W.3d 712, 716 (Tex. 2002) (internal quotations omitted).

To prove appellant's guilt, the State was required to present evidence of circumstances from which a rational jury could infer that the appellant acted at least recklessly—that is, that appellant was aware of but consciously disregarded a substantial and unjustifiable risk that the result would occur. *See* TEX. PENAL CODE § 6.03(c) (West). To determine whether conduct is reckless, a reviewing court looks to: (1) whether the act, when viewed objectively at the time of its commission, created a "substantial and unjustifiable" risk of the type of harm that occurred, (2) whether that risk was of such a magnitude that disregard of it constituted a gross deviation from the standard of care that a reasonable person would have exercised in the same situation, (3) whether the defendant was consciously aware of that risk, and (4) whether the defendant consciously disregarded that risk. *See Williams v. State*, 235 S.W.3d 742, 755–56 (Tex. Crim. App. 2007). In other words, the State was required to prove that appellant "actually fore[saw] the risk and consciously decide[d] to ignore it." *See id.* at 751–52 (it is that "devil may care" or "not giving a damn" attitude that raises conduct from criminal negligence to recklessness).

The record contains evidence from which the jury could rationally find the appellant guilty beyond a reasonable doubt under any of the alternative manner and means pled (CR—8). First, the evidence was sufficient to show that that appellant represented that he was selling a commodity or service of another. *See*

TEX. PENAL CODE § 32.42(b)(7) (West). Moody testified that when she opened the door for the appellant he informed her that he was there about her alarm (3 RR 24-25). The appellant, who was not in a uniform, gestured to her yard sign, which stated Central and told Moody that he could add a light to her sign as an upgrade (3 RR 24-29). The appellant continued to inform Moody about all the upgrades he could offer her for her alarm system, without mentioning that he worked for different alarm company (3 RR 24-29). Moody testified that it was not until later when they were inside her home that she realized he was selling her an alarm system from Capital (3 RR 24-32). At that point Moody testified that she felt confused and she testified that had she known he was with a different company she would not have let him in (3 RR 34). It is this deception, the strategy of getting his foot in the door by a misrepresentation, that Section 32.42(b)(7) prohibits.

Moreover, evidence from the extraneous victims supports that the appellant acted at least recklessly, if not intentionally or knowingly. The evidence established that the appellant's *modus operandi* was to be vague about whom he worked for and why he was at a customer's home, allowing the consumer to believe he worked for their alarm company in order to get inside their homes, sell them on the upgrades, and then show them the fine print. Andrew Davis testified that the appellant appeared at his home in July 2016 and similarly stated that he

was there to talk about his alarm system (4 RR 13-14). Davis testified that the appellant told him that he would replace his sign with a lit one to be more visible (4 RR 16). Davis stated that he believed the appellant worked for Stanley, his alarm company, due to his vague references and because he wore multiple lanyards around his neck, which were labeled with different security company names (4 RR 12). Davis explained that it was not until about 30 minutes into the house call that he realized the appellant worked for a different alarm company; he stated that he felt that the appellant misrepresented who he worked for (4 RR 16-20, 34).

James Zike also testified that the appellant appeared on his doorstep in June 2016, stating that he was there about his alarm system and made reference to Zike's yard sign from ADT (4 RR 66-67). Zike testified that he even introduced the appellant to his wife as an "ADT employee" and the appellant did not correct him (4 RR 79). Based on these actions, Zike assumed that the appellant worked for ADT and was surprised to learn otherwise (4 RR 67-79). Thus, the record reflects sufficient evidence that a rational jury or could infer from these circumstances the appellant consciously disregarded the risk that consumers would believe he was selling a commodity of another. *See* TEX. PENAL CODE § 32.42(b)(7) (West); *Elias v. State*, 08-15-00057-CR, 2016 WL 6473055, at *3 (Tex. App.—El Paso Nov. 2, 2016, no pet.) (not yet released for publication) ("Mental states are almost always inferred from acts and word."); *cf. Bounds v. State*, 355

S.W.3d 252, 255 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (finding evidence is insufficient to show appellant had a culpable mental state). And, as previously noted, this Court only needs to find evidence sufficient under one of the alternate manner and means. *See Fuller*, 827 S.W.2d at 931.

Similarly, the evidence was sufficient to establish that the appellant recklessly falsely represented the price of the service or made materially false or misleading statements in connection with the purchase of a service by telling Moody that the installation would be free, when it actually required her to sign a new contract at additional cost (CR—8). *See* TEX. PENAL CODE § 32.42(b)(9) (West); TEX. PENAL CODE § 32.42(b)(12)(B) (West). The record reflects that the appellant repeatedly told Moody that upgrading her system would be free (3 RR 25-30, 46, 61). The appellant explained that she would get a wireless[3] system, a life-alert button, a remote for the system, and installation for free (3 RR 25-30, 61).

Contrary to those assertions, however, the record reflects the items that the appellant repeatedly characterized as "free" required that Moody sign a new contract with Capital at a cost of $55.99 per month about $25 more than she was paying previously for her old system (3 RR 30-32, 44, 61). *See* (St. Ex. #1, 2, 5). Moody explained that she would not have agreed to the deal if she had known the cost (3 RR 62). Additionally, the record reflects that the technician began taking

[3] The record reflects that Moody did not have internet to work with a wireless system and the appellant was aware of that fact (3 RR 34-6).

Moody's old alarm system out *before* she signed a contract and learned the actual cost of getting these upgrades (3 RR 46, 60).

Furthermore, the jury learned of similar evidence from the extraneous victims that the appellant also informed them upon entering their homes that the upgrades were free. For instance, the appellant told Zike that all he needed to do would be to put a light on his sign to upgrade his system (4 RR 66, 70-73). Thus, the record reflects sufficient evidence to show that the appellant's actions were at least reckless; the appellant consciously disregarded a substantial and unjustifiable risk that the consumers believed they were getting free upgrades when it actually cost them money by way of the new contract and monthly fees.[4]

Reviewing the record in the light most favorable to the jury's verdict, there is sufficient evidence for a rational trier of fact to have concluded beyond a reasonable doubt that the appellant was guilty of each element of deceptive business practice. *Powell v. State*, 194 S.W.3d 503, 508 (Tex. Crim. App. 2006); *Jackson*, 443 U.S. at 319. Thus, the appellant's first point of error should be overruled.

[4] Moreover, the record reflects that the appellant instructed Moody to cancel her contract with Central, informing her to lie and "[t]ell them that I'm your son and that if they give you any flak." (3 RR 46). Moody testified that she ultimately could not cancel the contract and the appellant was aware of this as he removed the old system and signed her up for a contract with Capital (3 RR 47-52). These actions indicate that the appellant was aware of his actions and knew how Moody might be affected by his removing of her old system and requiring her to pay for the new system and old system.

REPLY TO APPELLANT'S SECOND POINT OF ERROR

In the appellant's second point of error, he argues that the jury charge allowed for a non-unanimous jury verdict. (App'nt Brf. 21-32). The appellant was charged by information for a single offense of deceptive business practices, and the State alleged he committed that offense in one of three alternative ways (CR—8, 87-8).

During the charge conference, the appellant requested for the jury to be charged that they must be unanimous regarding which manner and means they find the appellant guilty under (4 RR 104-8). The trial court denied the appellant's request (4 RR 108). The jury was charged by the trial court regarding these alternative manner and means in the disjunctive and instructed that they need not be unanimous regarding the manner and means (CR—87-8). Therefore, the jury was instructed that it could convict the appellant of deceptive business practices by any of the three allegations.

I. Standard of Review and Applicable Law

In determining jury charge error, a reviewing court first decides whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743-44 (Tex. Crim. App. 2005). If error is found in a jury charge, it is then analyzed for harm. *Ngo*, 175 S.W.3d at 743-44. The degree of harm necessary for a reversal depends on whether the appellant preserved the error by objection. *Id.* (citing *Almanza v. State*, 686 S.W.2d 157, 171

(Tex. Crim. App. 1984)). When, as in the present case, a defendant objects to the charge, he is required to show some harm. *Id.*; *Almanza*, 686 S.W.2d at 171;

A unanimous verdict is required in all cases. *Ngo*, 175 S.W.3d at 745; *Stuhler v. State*, 218 S.W.3d 706, 717 (Tex. Crim. App. 2007) (noting a unanimous verdict means that the jury must "agree upon a single and discrete incident that would constitute the commission of the offense alleged."). The jury is required to be unanimous on the essential elements of the offense; that they are convinced beyond a reasonable doubt that the prosecution has proved each essential element of the offense. *Jefferson v. State*, 189 S.W.3d 305, 311 (Tex. Crim. App. 2006) (quoting *State v. Johnson*, 627 N.W.2d 455, 459–60 (Wis. 2001)). However, "when the statute in question establishes different modes or means by which the offense may be committed, unanimity is generally not required on the alternate modes or means of commission." *Id*; *O'Brien*, 482 S.W.3d at 605 (citing *Renteria v. State*, 199 S.W.3d 499, 508 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd)).

To determine these essential elements of an offense for unanimity purposes courts generally turn to the so-called "grammar test" laid out in *Leza v. State*, 351 S.W.3d 344 (Tex. Crim. App. 2011). In *Leza*, the Court of Criminal Appeals indicated that "[t]he essential elements of an offense are, at a minimum: (1) the subject (the defendant); (2) the main verb; (3) the direct object if the main verb

requires a direct object (i.e., the offense is a result-oriented crime); the specific occasion, and the requisite mental state." *Id.* at 356-57.

Additionally, courts look to the gravamen or focus of the offense to determine what jurors must be unanimous about. *See Young v. State*, 341 S.W.3d 417, 423 (Tex. Crim. App. 2011); *see also Leza*, 351 S.W.3d at 357 (noting that the grammar test "will not necessarily work invariably, in every scenario, to accurately identify legislative intent."). There are three general categories of criminal offenses: "result of conduct," "nature of conduct," and "circumstances of conduct." *See Young*, 341 S.W.3d at 423-24. And courts look to the statutory language to determine, which category the crime falls under. *Id.*

Under the first category, "result of conduct," a jury generally must be unanimous only about the result, rather that the different acts committed that caused such result (i.e. murder). *Id.* And a jury must be unanimous about the specific result of the conduct. *Id.* at 424. "Nature of conduct" offenses, on the other hand, usually have different verbs in different sections, indicating the intent to punish different types of conduct (i.e. credit card abuse). *Id.* Thus, the jury must be unanimous about the specific criminal act. *Id.*

Finally, with a "circumstances surrounding the conduct" offense "the focus is on the particular circumstances that exist rather than the discrete, and perhaps different, acts that the defendant might commit under those circumstances." *Id.*

(noting failure to stop and render aid statute). Thus, a "circumstances surrounding the conduct" offense requires a jury to be unanimous about the existence of the particular circumstance that transforms an otherwise innocent act into a criminal one. Regardless, the concept remains the same: Is the gravamen or focus of the offense "the result of the act, the nature of the act itself, or the circumstances surrounding that act?" *Id.*

II. The jury was properly instructed that it must unanimously agree that the appellant committed a deceptive business practice.

Section 32.42(b) of the Texas Penal Code enumerates twelve different actions which constitute deceptive business practices, either separately or in combination. TEX. PENAL CODE § 32.42(b) (West). The statute provides that:

> A person commits an offense if in the course of business he intentionally, knowingly, recklessly, or with criminal negligence commits one or more of the following deceptive business practices:
>
> > (1) using, selling, or possessing for use or sale a false weight or measure, or any other device for falsely determining or recording any quality or quantity;
> >
> > (2) selling less than the represented quantity of a property or service;
> >
> > (3) taking more than the represented quantity of property or service when as a buyer the actor furnishes the weight or measure;
> > (4) selling an adulterated or mislabeled commodity;
> >
> > (5) passing off property or service as that of another;

> (6) representing that a commodity is original or new if it is deteriorated, altered, rebuilt, reconditioned, reclaimed, used, or secondhand;
>
> (7) representing that a commodity or service is of a particular style, grade, or model if it is of another;
>
> (8) advertising property or service with intent: (A) not to sell it as advertised, or (B) not to supply reasonably expectable public demand, unless the advertising adequately discloses a time or quantity limit;
>
> (9) representing the price of property or service falsely or in a way tending to mislead;
>
> (10) making a materially false or misleading statement of fact concerning the reason for, existence of, or amount of a price or price reduction;
>
> (11) conducting a deceptive sales contest; or
>
> (12) making a materially false or misleading statement: (A) in an advertisement for the purchase or sale of property or service; or (B) otherwise in connection with the purchase or sale of property or service.

TEX. PENAL CODE § 32.42(b) (West).

Applying the grammar test to section 32.42(b), the subject is "[a] person," the main verb is "commits," the direct object is "one or more of the following deceptive business practices" (the following being the enumerated offenses), and the requisite mental state is intentionally, knowingly, recklessly, or with criminal negligence. TEX. PENAL CODE § 32.42(b) (West); *see also O'Brien*, 482 S.W.3d at 606 (analyzing organizing crime statute under grammar test). The phrase "one or more

of the following" leaves some uncertainty for purposes of unanimity; however, as the First Court of Appeals noted in *O'Brien*, if the specific enumerated offenses were an essential element of deceptive business practice, then the use of the term "one or more" would be meaningless. *See O'Brien*, 482 S.W.3d at 606-8.

This phrase distinguishes the statutory language here from language in other statutes like the credit card abuse where the specific enumerated offenses are an essential element, making up the entirety of the statute. *Cf.* TEX. PENAL CODE § 32.31(b) (West); *see also Ngo*, 175 S.W.3d at 745-46. Section 32.31 of the Texas Penal Code, which states that "[a] person commits an offense [of credit card abuse if: ..." and lists 11 different offenses. TEX. PENAL CODE § 32.31(b) (West). In *Ngo*, the Court of Criminal Appeals found that the enumerated acts constituting credit card abuse were separate, independent offenses rather than a single offense with different manner and means. *Ngo*, 175 S.W.3d at 745-46. Thus, the Court of Criminal appeals found that the statute required unanimity for each specified act. *Id.*

In the present statute, however, as previously noted, the statutory language is different. The direct object includes the phrase "deceptive business practices" and states that a person commits deceptive business practices if such person engages in "one or more" enumerated actions. TEX. PENAL CODE § 32.42(b) (West). Thus, the statute allows for a single criminal act—committing deceptive business

practices—and the enumerated acts describe *how* the defendant committed the specific statutory criminal act. *Cf. O'Brien*, 482 S.W.3d at 610 (finding the phrase "one or more" distinguished engaging in organizing crime from the scenario in *Ngo*; holding that "the enumerated offenses in section 71.02 [of the Texas Penal Code] set forth the manners and means by which a person commits the offense of engaging in organized criminal activity.").

Additionally, an offense under section 32.42(b) appears to be a "circumstances of conduct" offense, due to requiring the defendant to be "in the course of business" while performing one or more of the deceptive acts. *See Young*, 341 S.W.3d at 423-24. Similar to unlawful discharge of a firearm where someone would be blameless if fired a weapon at a firing range rather than a public parking lot, the deceptive acts enumerated would not be criminal unless it was performed "in the course of business." *Id.* Thus, unanimity is required about the existence of the particular circumstance that makes the otherwise innocent act criminal. *Id.* at 424, 427-28 (finding that failure to report a change of address as a sex offender is a circumstances of conduct offense; holding that jurors must unanimously agree only that a sex offender failed to fulfill his reporting duty, not how he failed that duty specifically).

Contrary to the appellant's argument, this is not a "what crime was committed" question, but a "how was the crime committed" question. The jury

was required to be unanimous that the appellant committed a deceptive business practice while in the course of business; they were not required to agree as to how he was deceptive. Accordingly, the trial court did not err by failing to instruct jurors to be unanimous regarding the specific manner and means alleged. The appellant's second point of error should be overruled.

CONCLUSION

It is respectfully submitted that all things are regular and the conviction should be affirmed.

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CERTIFICATE OF SERVICE AND COMPLIANCE

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Date: December 18, 2017